

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NESTER GALLEGOS ZEPEDA,

Defendant and Appellant.

B200984

(Los Angeles County  
Super. Ct. No. KA057764)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wade D. Olson, Commissioner. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant and appellant Nester Gallegos Zepeda pleaded guilty to two counts of lewd or lascivious conduct on a child under the age of 14. As a part of his plea bargain he was ordered, among other things, to register as a sex offender and to complete a sex offender treatment program and an AIDS education class. Defendant failed to comply with these orders, and his probation was revoked. He contends on appeal that the trial court abused its discretion in revoking his probation. We disagree and affirm the judgment.

## BACKGROUND

### I. Background.

#### A. *Defendant enters into a plea agreement in 2002.*

In 2002, defendant was charged with two counts of continuous sexual abuse (Pen. Code, § 288.5, subd. (a))<sup>1</sup> and two counts of lewd or lascivious conduct on a child under the age of 14 (§ 288, subd. (a)). On August 15, 2002, he pleaded guilty to the two counts of lewd or lascivious conduct on a child under the age of 14, and the remaining counts were dismissed. He was thereafter sentenced, on November 21, 2002. The court suspended imposition of sentence and placed defendant on 10 years' probation on the condition he spend one year in jail. He was also ordered, among other things, to register as a sex offender under section 290, to participate in a sex offender treatment program, and to take an AIDS education class. Defendant was initially supervised in Kings County, where he resided. But in May 2005 he returned to Los Angeles County.

Defendant's probation was thereafter preliminarily revoked in October 2006, when the trial court received a report that defendant had failed to enroll in and complete the sexual abuse counseling. According to the report, defendant completed five classes about depression, which he contended satisfied the requirement he complete 52 sessions of sex offender counseling. At a hearing on November 20, 2006, at which defendant admitted violating the terms of his probation and waived his right to a formal hearing, the trial

---

<sup>1</sup> All further undesignated statutory references are to the Penal Code.

court suspended execution of an eight-year sentence and reinstated probation. Defendant was ordered to serve 31 days in jail and to enroll in a sex offender counseling program and an AIDS education class. The court warned defendant that he would sentence him to the eight years in prison if he failed to comply with the terms of his probation. The court also reminded defendant that he had to register as a sex offender and “[t]hat is for life.”

*B. Defendant’s probation is revoked in 2007.*

Then, on January 26, 2007, defendant’s probation was again preliminarily revoked when the trial court received a probation report that defendant had failed to register as a sex offender, failed to appear for an arraignment for a violation of section 243, subdivision (e)(1), and failed to register for classes.

A probation violation hearing was held on July 13, 2007.

**1. The probation officer’s testimony.**

At the hearing, Johnny Hernandez, defendant’s supervising probation officer, testified that he had supervised defendant since May 2005. Although defendant had been ordered to complete 52 sessions of sex offender counseling, he had completed none. To Hernandez’s knowledge, defendant has also not completed the one AIDS class he had been ordered to attend. Defendant told Hernandez that he had completed the classes, but he never provided documentation, despite Hernandez’s repeated requests. The last day defendant reported to Hernandez was December 19, 2006. Defendant was also charged with misdemeanor battery in September 2006. Defendant had been ordered to pay restitution in the amount of \$6,152, but he had a balance of \$3,737.

Defendant had once asked Hernandez for permission to leave the county to visit his sick mother. Hernandez did not give him permission to go, but defendant left; Hernandez did not file a probation violation because he had no proof that defendant had left. Defendant also asked on September 11, 2006 to see his mother, but he did not go because, she was feeling better. Defendant failed to register as a sex offender in December 2006, but he did register all prior years. He was supposed to register in January 2007 for his birthday, but he did not.

## **2. Defendant's testimony.**

Defendant testified that for a while he was being supervised in Kings County, in Northern California. He attended counseling while in Kings County and gave proof of it to the Kings County probation officer.

In September 2006, his mother became ill, and he asked Hernandez if he could go to see her. Hernandez told him he couldn't go, but defendant went anyway because his mother was dying. In fact, she died just days before his testimony. Upon his return, defendant talked to a probation officer other than Hernandez. Defendant was told to make an appointment to see a judge, which he did. But before his appointment, he was arrested for failing to register. He had tried to register, but he was told to come back in January. When he went in January, his application wasn't accepted, and he was told to come back on January 13, his birthday.

Defendant admitted he had not completed his sex offender counseling program and AIDs education class.

### *C. The court revokes probation.*

That same day, July 13, 2007, the trial court revoked probation and imposed eight years in prison.

## **DISCUSSION**

### **I. The trial court did not abuse its discretion by revoking defendant's probation.**

Defendant contends that the revocation of his probation was an abuse of the trial court's discretion, because there was no showing his failure to comply with conditions was willful. We disagree with this contention.

“[I]f the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation,” probation may be revoked. (§ 1203.2, subd. (a).) The determination whether to revoke probation is largely discretionary. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981-982.) “[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence” (*People v.*

*Rodriguez* (1990) 51 Cal.3d 437, 439), but the evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378-379 (*Zaring*)).

In *Zaring*, the defendant, who had entered into a plea agreement, was ordered to be in court for an 8:30 a.m. hearing. She was 22 minutes late. (*Zaring, supra*, 8 Cal.App.4th at p. 375.) She explained to the trial court that her childcare plan fell through, and that was why she was late. Although the trial court apparently accepted as true her explanation, it nonetheless revoked her probation. The Court of Appeal said, "Nothing in the record supports the conclusion that her conduct was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court. However, as a result of last minute circumstances, the appellant was approximately 22 minutes late to court, having driven some 35 miles from her home to the courtroom. Collectively, we cannot in good conscience find the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a willful violation of that condition." (*Id.* at p. 379, fns. omitted.) The Court of Appeal therefore found that the trial court abused its discretion by revoking the defendant's probation.

Defendant analogizes his case to *Zaring*. He explains that he had always properly registered. But circumstances began "cascading" in late 2006—his mother became ill in September; he was evicted from his residence and was homeless by December 2006;<sup>2</sup> and when he tried to register in December 2006, he was told to come back on his birthday in January 2007. Even if we accepted defendant's argument that these circumstances show he was not willfully failing to comply with the terms of his probation, these circumstances do not explain why he failed to complete his sex offender treatment program and AIDS class. That program and class were ordered in 2002. The trial court,

---

<sup>2</sup> According to the probation officer's report, defendant reported that he was evicted from his trailer and became homeless on December 17, 2006.

in November 2006 at the first probation violation hearing, reminded defendant of his obligation to complete those classes. But as of July 2007 defendant's probation officer, Hernandez, had no documentation showing that defendant had taken or completed those courses. Therefore, even if we agreed that unforeseen circumstances somehow prohibited defendant from complying with some of the terms of his probation in late 2006, it is unclear why he had not complied with them before that time.

We therefore affirm the judgment.

**DISPOSITION**

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.